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In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. 649

LOCAL 174 and JOINT COUNCIL No. 28 of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; GEORGE CAVANO and JIMMY MARTIN
Petitioners,

vs.

DELL L. SELLES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	8
1. This Case Involves the Same Question as That Involved in *International Association of Machinists et al, v. Gonzales*, a Case Now Awaiting Review by This Court	8
2. The Judgment Below Is in Direct Conflict With the Federal Pre-Empetion Doctrine Which Has Been Enunciated and Applied by This Court	10
Conclusion	14
Appendix A	15
1. Opinion of the Washington Supreme Court	15
2. Judgment of the Washington Supreme Court	34
Appendix B, Statutes Involved	37

CITATIONS

Cases

Garner v. Teamsters, 346 U.S. 485 (1953)	11, 13
Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957)	11
International Association of Machinists et al, v. Gonzales, 142 Cal. App.2d 207, 298 P.2d 92 (1956), cert. granted, 352 U.S. 966 (1957)	8, 9, 10
Radio Officers Union v. National Labor Relations Board, 347 U.S. 17 (1954)	13
Selles v. Local 174 and Joint Council No. 28 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; George Cavano and Jimmy Martin, 150 Wash. Dec. 631, 314 P.(2d) 456 (1957)	2, 15
Teamsters v. New York, New Haven and Hartford R.R. Co., 350 U.S. 155 (1956)	11
Weber v. Anheuser-Busch, 348 U.S. 468 (1955)	11, 13

Page

Statutes

Labor Management Relations Act of 1947, as amended, 61 Stat. 136, 26 U.S.C. §§ 141-187 ..... 2, 37
Section 2(7) 4, 37
Section 7 37
Section 8(a)(3) 37
Section 8(b)(1)(A) 2, 5, 7, 13, 38
Section 8(b)(2) 2, 5, 7, 13, 38
Section 10(a) 38
Section 10(e) 12, 38
28 U.S.C. 1257(3) 2

Miscellaneous

National Labor Relations Board, 21st Annual Report 13

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

Petitioners pray that a writ of certiorari issue to review the judgment of the Washington supreme court entered in the above-entitled case on September 10, 1957.

CITATIONS TO OPINIONS BELOW

The opinion of the superior court for King County, Washington, is unreported and is printed in the certified statement of facts (St. 497-501).[1]

[1] The record certified to this court by the clerk of the court below consists of a "Statement of Facts" (the transcript of proceedings at the trial); a "Transcript on Petition for Writ of Certiorari" (consisting of various pleadings, papers and documents in the case); and the original exhibits. In this petition, references to the Statement (St.) are references to the "Statement of Facts." References to the Transcript (T.) are references to the "Transcript on Petition for Writ of Certiorari." References to the Exhibits (Def. Ex. or Plt. Ex.) are references to the original exhibits.

The opinion of the Washington supreme court is reported in 150 Wash. Dec. 631, 314 P.(2d) 456 (1957), and is printed in the certified transcript (T. 110-125) and in Appendix A, *infra*, pp. 15-33.

JURISDICTION

The judgment of the supreme court of Washington was entered on September 10, 1957 (T. 126) (Appendix A, *infra*, p. 34). The jurisdiction of this court is invoked under 28 U.S.C. Section 1257 (3), since rights, privileges and immunities specially set up and claimed under statutes of the United States have been denied.

QUESTION PRESENTED

Whether a state tribunal has jurisdiction to award compensation for loss of earnings against a union in favor of an employee for asserted acts by the union which constitute unfair labor practices under sections 8(b)(1)(A) and 8(b)(2) of the Labor Management Relations Act of 1947, as amended.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are those included in the Labor Management Relations Act of 1947, as amended, 61 Stat. 136, 29 U.S.C. Secs. 141-187. Pertinent sections of the Act are reproduced in Appendix B, *infra*, pp. 37-39.

STATEMENT OF THE CASE

Petitioner Local 174 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor union, the members of

which work in various industries in and around Seattle, Washington (St. 86). Petitioner George Cavano is an agent of petitioner Local 174. At the times in question, he served in the capacity of business agent or president (St. 80, 81). Petitioner Local 174 is hereafter referred to as Local 174, and petitioner George Cavano is referred to as Cavano.

Petitioner Joint Council No. 28 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization composed of Local 174 and all the other local unions affiliated with the International Brotherhood of Teamsters in the State of Washington (St. 82). Petitioner Joint Council No. 28 operates a "hiring hall" in Seattle, Washington (St. 91). At the times in question, petitioner Jimmy Martin was the chief dispatcher at this hiring hall (St. 110). Petitioner Joint Council No. 28 is hereafter referred to as the Joint Council, and petitioner Jimmy Martin is referred to as Martin.

At the times in question, respondent Dell Selles was, and still is, a member in good standing of Local 174 (St. 136). Respondent Dell Selles is hereafter referred to as Selles.

Members of the local unions affiliated with the Joint Council, including members of Local 174, are entitled to seek work through the Joint Council hiring hall (St. 91). Employers needing extra truck drivers, or helpers, will call the hiring hall and the dispatcher will send out whatever men are available (St. 235-236).

During the greater part of 1951, and in the early part of 1952, Selles was working out of the hiring hall (St.

138). He was dispatched from the hall to work as a driver or a helper (St. 139, 141) for various companies in the brewing and wholesale beverage distributing industries (St. 225, 232, 302, 333, 355). The companies for whom Selles worked were engaged in industries affecting commerce as those terms are defined in Section 2(7) of the Labor Management Relations Act (App. B., *infra*, p. 37).[2]

In the spring of 1952 Selles became active in an intra-union reform movement (St. 10, 11, 144). On April 3, 1952, this reform group sponsored a meeting to which all interested members of Local 174 were invited (St. 54). Selles helped arrange the meeting (St. 143), but he did not attend (St. 142).

Four days later, on April 7, 1952, Selles and two other members associated with him in the intra-union reform movement, Andrew Grein and Robert Brewer, reported to the hiring hall, looking for work. According to their testimony at the ensuing trial, they were told by Martin, the dispatcher, that there would be no further work for them out of the hall (St. 13-14, 48-49, 149). Selles testified that he was generally unable to get jobs through the hall after this date and that he was forced to abandon truck driving work and seek employment in a different industry (St. 155-156).

On the same day, April 7, 1952, Selles, Grein and Brewer went to the Seattle offices of the National Labor

[2] Among other companies, Selles worked for Lang and Company (St. 225) which had annual out-of-state sales of over $50,000 (St. 224); Rainier Brewery (St. 232) which had annual out-of-state sales of over $50,000 (St. 230); and Woodhouse Beverages (St. 333) which had annual out-of-state purchases in excess of $240,000 and out-of-state shipments of empty containers valued in excess of $30,000 (St. 491).

Relations Board and filed unfair labor practice charges against Local 174 (St. 149). These charges asserted that the Local had violated the Labor Management Relations Act by refusing to dispatch them from the hiring hall (Def. Ex. 12). An amended charge was filed by the same three men on September 10, 1952, naming the Joint Council and Cavano as additional respondents (Def. Ex. 14). On September 20, 1952, the Regional Director of the National Labor Relations Board formally issued a complaint (consolidated with another case) in which Local 174, the Joint Council and Cavano were charged by the Board with having violated Sections 8(b)(1)(A) and 8(b)(2) of the Act for refusing to dispatch Dell Selles to available work in the Seattle beer distributing industry because of his part in the meeting of April 3, 1952 (Def. Ex. 15). A hearing was scheduled, but before it was held, Selles and the other charging parties withdrew their charges (St. 192-195). As a result, on January 9, 1953, the Regional Director of the Board withdrew the formal complaint (Def. Ex. 16).

On March 9, 1954, Selles filed the instant action against the petitioners in the Superior Court for King County, Washington. In his complaint, Selles alleged that the petitioner had conspired to prevent him from getting employment through the hiring hall and that this action was taken by the petitioners in retaliation for his efforts in the intra-union reform movement and because of his part in arranging the meeting of April 3, 1952. He prayed for damages in the amount of $21,075.22 for petitioners' interference with his past and future employment (T. 1-4).

Petitioners answered this complaint and alleged, *inter alia*, that the subject matter of the complaint was governed by the terms of the Labor Management Relations Act, that the National Labor Relations Board was empowered to afford to respondent a remedy for the wrongs he allegedly suffered at the hands of petitioners, including an award of back pay for wages lost, and that, as a result, the state court had no jurisdiction (T. 8-11).

Trial was held before a jury on March 7-11, 1955. At the conclusion of the trial, petitioners moved for a directed verdict on the ground that the state court lacked jurisdiction of the subject matter (St. 478). This motion was denied and the jury returned a verdict in favor of Selles for $6,572.15 (T. 107).[3] Petitioners moved for judgment notwithstanding the verdict, but this motion was also denied (St. 501).[4] Judgment was entered (T. 108), and an appeal was taken by petitioners to the Supreme Court of the State of Washington (T. 109).

On August 8, 1957, the court below affirmed the trial court judgment in a 6-to-3 decision (T. 110-125, App. A, *infra*, pp. 15-25). The court found that the conduct of the petitioners, in refusing to dispatch Selles for work with employers engaged in interstate com-

[3] The damages awarded by the jury were the equivalent of the wages actually lost by Selles as a direct result of the conduct of petitioners. Selles asked for an instruction that would have allowed the jury to assess future loss of earnings but this was rejected by the trial court (St. 473-474).

[4] The trial court filed a memorandum opinion expressing the view that the state court had jurisdiction of the subject matter, because the action was brought only as a common law suit for damages, and did not involve labor relations (St. 497-501).

merce, in retaliation for his part in organizing the reform meeting of April 3, 1952, constituted unfair labor practices under sections 8(b)(1)(A) and 8(b)(2) of the Labor Management Relations Act. In the words of the court, "the facts reasonably bring the controversy within the purview of the act" (T. 113, App. A, *infra*, p. 19).

Nevertheless, the court ruled that Selles could bring a common-law action for damages, based on these same facts, in a state court. The court held that the doctrine of federal pre-emption did not apply to bar such an action because, in the court's view, Selles was only interested in collecting damages for a common law tort, and he was "not interested in preventing any person from engaging in any unfair labor practice" (T. 119, App. A., *infra*, p. 27). The court also expressed the opinion that the remedy available in the state courts, *i.e.*, damages for tort, did not clash with the remedies available from the National Labor Relations Board:

> "Under the facts of this case, there is no 'resounding collision' between the remedies afforded under the act and in the state court. Under the one, the board shall issue a cease and desist order and *may* order reinstatement, with or without back pay. Under the other, the state court may not enjoin or issue a cease and desist order (except in case of violence), and may not order back pay, but it can award damages for a common-law tort. The relief granted by the board, with the exception of the cease and desist order, is entirely discretionary and is exercised to effectuate the policies of the act and, in particular, to prevent unfair labor practices. The relief granted in a common-law tort action is compensation to a plaintiff for damages

sustained by reason of the tort." (T. 120, App. A, *infra*, p. 29)

The court concluded:

> "Where the relief granted under state procedure is so similar to that granted under the act that a conflict ensues between the two, the conflicting state procedure is excluded. Where such relief is not similar to that afforded under the act, there is no conflict between the state and Federal remedies, and the state procedure survives. *United Constr. Workers v. Laburnum Constr. Corp., supra.* Respondent's right to damages, in this case, for a common-law tort, differs from any remedy which the board has power to provide. The state court, therefore, had jurisdiction to entertain the action." (T. 120-121, App. A, *infra*, p. 29)

Three members of the court dissented from this view, being of the opinion that the doctrine of federal preemption applied and that the state courts had no jurisdiction to adjudicate Selles' cause of action (T. 122-125, App. A, *infra*, pp. 30-33).

Judgment affirming the trial court judgment was entered in the court below on September 10, 1957 (T. 126, App. A, *infra*, p. 34).

REASONS FOR GRANTING THE WRIT

1. This Case Involves the Same Question as That Involved in *International Association of Machinists, et al., v. Gonzales*, a Case Now Awaiting Review by This Court

The question involved in this case is the same question now before this court in *International Association of Machinists, et al v. Gonzales*, 142 Cal. App.2d 207,

298 P.2d 92 (1956), cert. granted, 352 U.S. 966 (January 14, 1957) (No. 31). As stated in the petition for certiorari filed in *Gonzales*, the primary question involved in that case is:

> ". . . whether a state tribunal has jurisdiction to award compensation for loss of earnings against a union in favor of an employee for asserted acts by the union which constitute unfair labor practices under Sections 8(b)(1) and 8(b)(2) of the Labor-Management Relations Act . . ."

The facts in the instant case, and in *Gonzales* are substantially the same. In both cases the petitioner unions refused to dispatch the respondents to available work opportunities with employers engaged in industries affecting commerce. In the instant case the union took such action in retaliation for Selles' participation in an intra-union dispute. In *Gonzales* the union took such action in retaliation for Gonzales' refusal to pay a union fine.

In both cases the respondents first filed charges against the unions with the National Labor Relations Board, and then withdrew such charges, and began civil actions in the state courts. In the instant action the respondent founded his action in tort, *i.e.*, he alleged that the union unlawfully interfered with his employment. In *Gonzales* the respondent founded his action in contract, *i.e.*, he alleged that the union breached the contract existing between him and the union (the union Constitution).

In both cases, the respondents recovered damage awards for the loss of earnings they sustained because

of the unions' conduct.[5] In both cases, the unions argued that the subject matter was governed by the terms of the Labor Management Relations Act, that the National Labor Relations Board was empowered to afford a remedy, by way of a back pay award, to compensate the respondents for their lost earnings, and that as a result, the state courts lacked jurisdiction.

In both cases, the appellate courts below held that the federal pre-emption doctrine did not apply to deprive the state courts of jurisdiction. Both courts were of the opinion that because the respondents were bringing actions at common law, and did not specifically charge anyone with "unfair labor practices," that the state courts were free to adjudicate the causes of action. Both courts rejected the argument that allowing state court action in an area in which the National Labor Relations Board was empowered to act, would result in a conflict of remedies.

The two cases being substantially the same, we should like to assert, by reference, all of the reasons for granting certiorari which were ably advanced by counsel for the petitioners in *Gonzales*.

2. The Judgment Below Is in Direct Conflict with the Federal Pre-Emption Doctrine Which Has Been Enunciated and Applied by This Court

This court, in a series of familiar cases, has ruled that state tribunals are without jurisdiction to deal with conduct which falls within the terms of the Labor Man-

[5] In the instant case the jury awarded damages only for the loss of earnings suffered by the respondent. (See the trial court's instructions No. 1 and No. 9, St. 447, 454-455). In *Gonzales*, the trial court awarded damages for loss of earnings and, in addition, for mental anxiety

agement Relations Act, and which does not involve violence or the obstruction of the public streets and highways. In such a situation the National Labor Relations Board has exclusive jurisdiction. *Garner v. Teamsters*, 346 U.S. 485 (1953); *Weber v. Anheuser-Busch*, 348 U.S. 468 (1955); *Teamsters v. New York, New Haven and Hartford R. R. Co.*, 350 U.S. 155 (1956); *Guss v. Utah Labor Relations Board*, 353 U.S. 1 (1957). As this court explained in the *Garner* decision, *supra*, it was the desire of Congress, in enacting the Labor Management Relations Act, to adopt a uniform federal policy dealing with labor-management relations. A uniform federal policy would be frustrated if both state and federal remedies could be brought to bear on the same conduct. In the words of this court, "when two separate remedies are brought to bear on the same activity a conflict is imminent." 346 U.S. 485 at p. 498-499.

The court below has permitted a state court remedy to be brought to bear on the identical conduct for which there is a remedy under the terms of the Labor Management Relations Act. This is clearly an erroneous holding under this court's federal pre-emption doctrine. However, the court below attempted to justify its holding on the ground that, under the facts of this case, there was no likelihood of the state court remedy conflicting with a remedy provided through the National Labor Relations Board. In the words of the court, "respondent's right to damages, in this case, for a common law tort, differs from any remedy which the board has power to provide" (T. 121, App. A, *infra*, p. 29). This reasoning cannot be sustained. The remedy afforded in

the state courts for the conduct in question is substantially the same remedy that is available through the National Labor Relations Board.

In his state court action, respondent alleged that the conduct of the petitioners in refusing to dispatch him for available work, because of his participation in arranging the meeting of April 3, 1952, constituted unlawful interference with his employment and *he requested damages for the loss of earnings he sustained as a result of that conduct.*[6] When the case was submitted to the jury, the jury was instructed that they could award damages only for the "impairment of (respondent's) earning power," and respondent's attorney advised the jury that the proper way to assess such damages was to take the scale of wages which respondent was currently earning, and the scale of wages which he would have earned had he been working out of the hiring hall as a truck driver, and then to award him the difference between the two figures (St. 454-455, 462). The jury's verdict, therefore, represents an award of "back pay" to the respondent, compensating him for the earnings he lost because of the conduct of the petitioners.

An award of "back pay" is the exact remedy which the National Labor Relations Board is empowered to afford in this type of case.[7] Under Section 10(c) of the

[6] As the trial court explained to the jury, "In this action the plaintiff seeks recovery of damages consisting of loss of earnings which he alleges was due to the wrongful acts of defendants in interfering with his employment" (St. 447).

[7] There is no question but that the conduct of the petitioners in this case constitutes an unfair labor practice under the terms of the Act. The Court below so held (T. 111-113, App. A., *infra*, 17-19). It is also to be

Act, the Board is authorized to order persons to cease and desist from unfair practices, and, in addition, to award back pay (App. B, *infra*, pp. 38-39). The Board follows the practice of awarding compensatory back pay in all cases where discriminatory conduct by employers or unions has caused an employee to suffer a loss of earnings.[5] As this court pointed out in *Radio Officers Union v. National Labor Relations Board*, 347 U.S. 17, at p. 55, "The policy of the Act is to make whole employees . . . discriminated against." It is true, as the court below pointed out, that an award of back pay is a discretionary matter with the Board. This does not make the Board's *power* to award back pay any less real, or the danger of conflicting remedies any less imminent. The authority of the Board to seek injunctive relief against union picketing is also a matter that calls for the exercise of Board discretion, but this court has not allowed state courts to grant such relief. *Garner v. Teamsters*, 346 U.S. 485 (1953); *Weber v. Anheuser-Busch*, 348 U.S. 468 (1955).

There is, therefore, a potential conflict of remedies involved in the instant case. The judgment of the court below has permitted state court action to be brought

[5] The importance of back pay awards in Board proceedings is illustrated by the fact that in fiscal year 1956, the Board ordered employers and unions to pay more than $1,100,000 to employees who had been discriminated against in violation of the Act. NLRB 21st Annual Report, p. 166.

noted that before respondent started his state court action, he filed charges with the National Labor Relations Board, and the Board took jurisdiction and issued a complaint charging the petitioners with violating Sections 8(b)(1)(A) and 8(b)(2) of the Act (Def. Ex. 15). This complaint was later withdrawn (Def. Ex. 16) at the request of the respondent (St. 192-193).

to bear on a subject matter which falls within the terms of the federal Act, and it has allowed the state courts to afford a remedy which is substantially identical with that available through the National Labor Relations Board. The judgment of the court below is clearly erroneous under the federal pre-emption doctrine previously enunciated by this court.

CONCLUSION

For the reasons stated, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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APPENDIX A

1. OPINION OF THE WASHINGTON SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DELL L. SELLES, *Respondent*, v. LOCAL 174 AND JOINT COUNCIL NO. 28 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; GEORGE CAVANO AND JIMMY MARTIN, *Appellants*.	No. 33527 En Banc

Filed August 8, 1957

Dell L. Selles commenced action in the Superior Court for King County seeking damages for the alleged refusal of defendants, through the union's hiring hall, to send him out to work as a teamster. The jury awarded him $6,572.15. A motion for judgment notwithstanding the verdict was denied and this appeal follows.

At the times in question, Selles was, and still is, a member of Local 174 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. He had been a truck driver in the beverage and brewing industries and for several years had secured employment through the teamsters' hiring hall with companies engaged in interstate commerce.

For some time prior to April 3, 1952, there had been a controversy within the local with respect to the method of electing officers and the accessibility of information relative to union funds. Selles and others arranged for a meeting of members sympathetic with their views for the purpose of discussing their grievances. At about the time the meeting was to get under way, approximately one hundred fifty other members, not sympathetic, marched into the hall five abreast and broke up the meeting.

A few days later when Selles went to the hiring hall he was told that there would be no work for him. This was done in retaliation against him for his activities in helping to organize the meeting of April 3, 1952. He was without work for over a year, except for two short periods of time, and was ultimately compelled to leave the industry and find less remunerative work in another field.

Selles filed a complaint with the National Labor Relations Board, alleging the facts above related. The Board took jurisdiction and issued a complaint. However, before a hearing could be had, he withdrew his charge and instituted this action in the state court to enforce a common-law tort liability for interference with his employment.

Appellant contends that the action complained of constitutes an unfair labor practice under the Labor Management Relations Act of 1947; that Congress, by that Act, pre-empted the field; and the state court had no jurisdiction of the cause.

Section 8 (b) of the Act (Chapter 120, Eightieth

Congress, Sess. I [61 Stat. 141] approved June 23, 1947) 29 U.S.C.A. (Sup.) § 158 (b) provides in part:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: . . . "

Section 7 provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

The right of self-organization includes the right to attempt to change the leadership and policies of a union. *Brown v. National Union of Marine Cooks and Stewards*, 104 F.Supp. 685.

In *Joanna Cotton Mills Co. v. National Labor Relations Board*, 176 F.(2d) 749, the court said:

"Not all activities in which employees act together are 'concerted activities' within the meaning of the statute. . . .

"The words 'concerted activities' are limited in meaning by the words with which they are associated (*noscitur a sociis*), which have relation to labor organization and collective bargaining, and by the purpose of such 'concerted activities,' which is expressly limited by the immediately succeeding language to concerted activities 'for the purpose

of collective bargaining or other mutual aid or protection.' . . .

"We agree that the 'concerted activities' protected by the act are not limited to cases where the employees are acting through unions or are otherwise formally organized. It is sufficient that they are acting together for mutual aid or protection. See N.L.R.B. v. Peter Cailler Kohler Swiss Chocolates Co., Inc., 2 Cir., 130 F.(2d) 503. Thus, an employee may not be discharged for concerted activities to get pay for overtime work, N.L.R.B. v. Schwartz, 5 Cir., 146 F.(2d) 773, 774; nor for concerted activities in protesting the employment of a cashier whose employment the employees think will affect their earnings, N.L.R.B. v. Phoenix Mutual Life Ins. Co., 7 Cir., 167 F.(2d) 983, nor for demonstrating in protest over the firing of a union president, Carter Carburetor Corp. v. N.L.R.B., 8 Cir., 140 F.(2d) 714. As said by Judge Duffy in N.L.R.B. v. Phoenix Mutual Life Ins. Co., supra [167 F.(2d) 988], 'A proper construction is that the employees shall have the right to engage in concerted activities for their mutual aid or protection even though no union activity be involved, or collective bargaining be contemplated.' It is clear, however, that to be protected the purpose of the concerted activities must be the mutual aid or protection of the employees; . . . "

Respondent and his companions, in organizing the meeting in question, were acting together, for "mutual aid and protection" within the meaning of the Act.

Section 8 (b) (2) makes it an unfair labor practice for a labor organization or its agents "to cause or attempt to cause an employer to discriminate against an employee in violation of Subsection (A) (3) . . ." That

subsection refers to "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage membership in any labor organization. . . ."

The proof showed that the union, through its officers, controlled employment in respondent's field of work, and that without approval of its officials no work could be obtained. The refusal to dispatch respondent for work, in retaliation for the part he played in organizing the meeting constituted "discrimination in regard to hire."

The facts reasonably bring the controversy within the purview of the Act. However, that alone is not determinative of the problem confronting us. Does the National Labor Relations Board have exclusive jurisdiction over matters involving conduct which constitutes an unfair labor practice under the Act, so as to preclude a state court from hearing and determining a common-law tort action for damages resulting from interference with employment based on such conduct?

Concerning pre-emption in the field of labor relations, the United States Supreme Court said, in *International Union v. Wisconsin Empl. Rel. Bd.*, 336 U.S. 245, 93 L.ed. 651, 662, 69 S.Ct. 935:

> "Congress has not seen fit in either of these Acts to declare either a general policy or to state specific rules as to their effects on state regulation of various phases of labor relations over which the several states traditionally have exercised control. . . . However, as to coercive tactics in labor controversies, we have said of the National Labor Relations Act what is equally true of the Labor Management

> Act of 1947, that 'Congress designedly left open an area for state control' and that 'the intention of Congress to exclude the States from exercising their *police power* must be clearly manifested.' Allen-Bradley Local, U.E.R.M.W. v. Wisconsin Employment Relations Bd. 315 US 740, 749, 750, 86 L.ed. 1154, 1164, 1165, 62 S.Ct. 820. . . ."

That case involved a question whether the federal act took precedence over a state act under which the state board ordered a labor union to cease and desist from instigating certain intermittent and unannounced work stoppages under a plan for a new method of putting pressure upon the employer. The court concluded:

> "We find no basis for denying to Wisconsin the power, in governing her internal affairs, to regulate a course of conduct neither made a right under federal law nor a violation of it and which has the coercive effect obvious in this device."

In addition to the above case, the Supreme Court has recognized the jurisdiction of state courts in the following cases: *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U.S. 740, 86 L.ed. 1154, 62 S.Ct. 820 (to enjoin mass picketing, threats of bodily injury and property damage to employees, obstruction of streets and public roads); *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301, 93 L.ed. 691, 69 S.Ct. 584 (allowed state to forbid enforcement of a maintenance-of-membership clause in a contract between employer and union; and *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 98 L.ed. 1025, 74 S.Ct. 833 (action in common-law tort for damages). As evidence that the

Supreme Court has recognized that the areas that have been pre-empted by the Federal act and thereby withdrawn from state power are still undetermined, the court, in *Amalgamated Clothing Workers of America v. Richman Bros.*, 348 U.S. 511, 99 L.ed. 600, 75 S.Ct. 452, stated:

> "... insofar as a penumbral region must remain between state and federal authority touching industrial relations until finally clarified by definitive rulings here or further legislation by Congress, state litigation must, in view of §2283, be allowed to run its course, including the ultimate reviewing power in this Court."

Appellants rely on *Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776 (A.F.L.) et al.*, 346 U.S. 485, 98 L.ed. 228, 74 S.Ct. 161. In that case the union peacefully picketed an interstate trucking company for the purpose of inducing the employees to join the union. Drivers for other carriers refused to cross the picket line, and, as a consequence, the company's business dropped off as much as ninety-five per cent. The Pennsylvania supreme court reversed an injunction ordered by the trial court against picketing, holding that the grievance of the petitioners fell within the jurisdiction of the N.L.R.B. In affirming, the United States Supreme Court said:

> "Congress has taken in hand this particular type of controversy where it affects interstate commerce. In language almost identical to parts of the Pennsylvania statute, it has forbidden labor unions to exert certain types of coercion on employees through the medium of the employer. It is not necessary or appropriate for us to surmise how

the National Labor Relations Board might have decided this controversy had petitioners presented it to that body. The power and duty of primary decision lies with the Board, not with us. But it is clear that the Board was vested with power to entertain petitioners' grievance, to issue its own complaint against respondents and, pending final hearing, to seek from the United States District Court an injunction to prevent irreparable injury to petitioners while their case was being considered. The question then is whether the State, through its courts, may adjudge the same controversy and extend its own form of relief.

"Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controveries. Indeed, Pennsylvania passed a statute the same year as its labor relations Act reciting abuses of the injunction in labor litigations attributable more to procedure and usage than to substantive rules. A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law."

In *United Construction Workers v. Laburnum Constr. Corp., supra,* agents of the unions demanded that the employees of the company join one of the unions. Upon refusal of the company and of many of its employees, the union agents threatened the company and its employees with violence to such a degree that the company was compelled to abandon its projects in the area where the unions were operating. The company sued in the Virginia state court for damages and obtained a judgment against the union. The United States Supreme Court sustained the jurisdiction of the Virginia court and affirmed its judgment, saying:

> "Petitioners contend that the Act of 1947 has occupied the labor relations field so completely that no regulatory agency other than the National Labor Relations Board and no court may assert jurisdiction over unfair labor practices as defined by it, unless expressly authorized by Congress to do so. They claim that state courts accordingly are excluded not only from enjoining future unfair labor practices and thus colliding with the Board, as occurred in Garner v. Teamsters C. & H. Local Union, 346 U.S. 485, 98 L.ed. 228, 74 C.St. 161, but that state courts are excluded also from entertaining common-law tort actions for the recovery of damages caused by such conduct. The latter exclusion is the issue here. In the Garner case, Congress had provided a federal administrative remedy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted. Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. For us to cut off the

injured respondent from this right of recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct. We see no substantial reason for reaching such a result. The contrary view is consistent with the language of the Act and there is positive support for it in our decisions and in the legislative history of the Act."

After quoting from the *Garner* case the court went on to say:

"To the extent that Congress prescribed preventive procedure against unfair labor practices, that case recognized that the Act excluded conflicting state procedure to the same end. To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated. The care we took in the Garner case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived. The primarily private nature of claims for damages under state law also distinguishes them in a measure from the public nature of the regulation of future labor relations under federal law.

"The Labor Management Relations Act sets up no general compensatory procedure except in such minor supplementary ways as the reinstatement of wrongfully discharged employees with back pay. . . ."

Appellants call attention to *Born v. Laube*, 213 F.

(2d) 407, wherein the plaintiff was a member of the Teamsters' Union at Anchorage, Alaska. For lack of employment he obtained work as an ordinary laborer with a construction firm and the union issued a withdrawal card to him. Later the company offered him a job as truck or bus driver. The union refused to reinstate him as a member and threatened to call all of its truck drivers off the job if the plaintiff were retained. In consequence he was removed as a truck driver and put back to work as an ordinary laborer.

Plaintiff sued the trustee of the Anchorage local, and the union, setting up two causes of action. By the first cause he sought reinstatement in the union, and by his second he sought a money judgment for loss of earnings and also prayed for exemplary damages. The trial court dismissed the action on the ground that the subject matter was within the exclusive jurisdiction of the N.L.R.B. This judgment was affirmed by the circuit court of appeals.

Subsequently, the *Laburnum* decision was handed down and Born petitioned for rehearing on the strength of that decision. The petition was denied (*Born v. Laube*, 214 F.(2d) 349), the court being of the opinion that the *Laburnum* case was distinguishable, inasmuch as the complaining party there, under the Act, was wholly without remedy in damages for the tortious conduct of the union, while in the *Born* case the complaining party had available the remedy of reinstatement with back pay. We are likewise of the opinion that the instant case is distinguishable from the *Born* case. Here the complaining party is not seeking reinstatement in

the union with back pay. He is seeking damages for a common-law tort.

Appellants also rely on our decision in *Mahoney v. Sailors' Union of the Pacific*, 45 Wn.(2d) 453, 275 P. (2d) 440, wherein we held that the National Labor Relations Board had exclusive jurisdiction in an action by a former member against a union, to grant him compensatory damages because of earnings lost by reason of the union's unfair labor practice; and that the state court was without jurisdiction to order his reinstatement in the union with all the rights and privileges of membership in so far as such order was intended as a means of forcing the union to cease such unfair labor practice. There can be no question but that Mahoney, by his action, placed himself squarely within the exclusive jurisdiction of the Board. He sought a judgment setting aside an order expelling him from the union, commanding his reinstatement, and awarding damages. See *Mahoney v. Sailors' Union*, 43 Wn. (2d) 874, 264 P.(2d) 1095.

Let us examine the Act further with regard to the procedure provided therein. Section 10 (a) provides: "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. . . ."

Subsection (b) provides that whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board shall have power to issue and cause to be served a complaint stating the charges, and containing a notice of hearing.

Subsection (c) provides:

> "The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with hte Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of facts and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: . . . "

Respondent is not interested in preventing any person from engaging in any unfair labor practice. He is not asking that he be reinstated in the union or that it be ordered to cease and desist, nor is he interested in back pay, as such. There is no relationship of employer and employee. That is all in the distant past. All he asks for is damages for a common-law tort.

In *Baun v. Lumber and Sawmill Workers Union*, 46 Wn.(2d) 645, 284 P.(2d) 275, an action by a discharged superintendent against a union and its members for having caused the employing company to bring about his discharge, we held that the state court had jurisdiction to entertain a common-law tort action brought by him, saying:

> "Further, we put our conclusion that the Washington courts have jurisdiction of the subject mat-

ter of this litigation on the still broader base that the traditional jurisdiction of a state court to enforce a common-law tort liability has not been removed, *at least in such a case as the present*, by the labor management relations act, even though the tortious conduct constitutes an unfair labor practice under the act.

"In considering this phase of the jurisdictional question, it is well to note at the outset *what the plaintiff is not asking.*

"He is not asking that any activities of the union or its members, or that any action by the company be restrained or enjoined; he is not asking that he be reinstated in his position, nor is he asking for back pay. He is not claiming that he is or was an employee within the purview of the labor management relations act.

"He accepts as *fait accompli* his discharge as superintendent of the company's mill. He alleges that his discharge was achieved in connection with and by means of an unlawful conspiracy, and that the union and its members, without cause or justification, caused his discharge by a threat to strike. His common-law action for unlawful interference with his employment or for conspiracy to unlawfully interfere with his employment, and his right to damages therefor, differs from any remedy which the national labor relations board has power to provide, and *it does not involve any question of present or future relations between the company and himself, or the company and its other employees.*"

We know that the Federal government has preempted the field as to many phases of labor relations, but not as to all. We cannot find from the Act, as inter-

preted by the Supreme Court, that it was the intention of Congress to deprive a workman of his time-honored right to sue in his own state court for damages resulting from a common-law tort and to relegate him, for sole relief, to this particular Federal agency.

Under the facts of this case, there is no "resounding collision" between the remedies afforded under the Act and in the state court. Under the one the Board shall issue a cease and desist order and *may* order reinstatement, with or without back pay. Under the other the state court may not enjoin or issue a cease and desist order (except in case of violence), and may not order back pay, but it can award damages for a common-law tort. The relief granted by the Board, with the exception of the cease and desist order, is entirely discretionary and is exercised to effectuate the policies of the Act and, in particular, to prevent unfair labor practices. The relief granted in a common-law tort action is compensation to a plaintiff for damages sustained by reason of the tort. Where the relief granted under state procedure is so similar to that granted under the Act that a conflict ensues between the two, the conflicting state procedure is excluded. Where such relief is not similar to that afforded under the Act there is no conflict between the state and Federal remedies, and the state procedure survives. *United Construction Workers v. Laburnum Construction Corp., supra.* Respondent's right to damages, in this case, for a common-law tort, differs from any remedy which the Board has power to provide. The state court, therefore, had jurisdiction to entertain the action.

The judgment is affirmed.

SCHWELLENBACH, J.

We concur:

DONWORTH, J.

MALLERY, J.

HILL, C. J.

FOSTER, J.

I concur in the result:

WEAVER, J.

Dissenting Opinion

FINLEY, J. (dissenting)—Relief was sought in the state courts by the plaintiff in the *Mahoney* case (45 Wn.(2d) 453, 257 P.(2d) 440), and by plaintiff in the instant case, based upon the theory of the commission of a common-law tort by a labor union; *i.e.*, an unlawful interference with employment or the right thereto. Mr. Mahoney had been expelled from the union. He was not dispatched or referred to employers for employment. He sought reinstatement to union membership and damages for loss of employment, that is, loss of earnings. In the instant case, Mr. Selles was not expelled from the union, but allegedly, among other things, the union did not dispatch or refer him to employers for employment. He sued for interference with his right of employment. Obviously, the practicable determinant as to damages would be loss of earnings.

I can see no distinction in fact or theory between the two cases in relation to the specific question of whether a basis existed in each case for a common-law tort action in the state courts. However, this is not too significant, because, as I see the matter, the crucial questions

are (a) whether the cases involved an unfair labor practice under the Taft-Hartley Act, and (b) whether jurisdiction of the National Labor Relations Board supersedes jurisdiction of the state courts.

In *Mahoney*, the court stated that the case did involve an unfair labor practice under § 8 (b) (2) of the act; that the labor board had jurisdiction of the alleged discrimination in employment and the matter of loss of earnings, and that the trial court had erred in assuming jurisdiction of this aspect of the controversy and awarding compensatory damages. Incidentally, in the *Mahoney* decision, the court did assert a limited state jurisdiction and held that Mahoney was entitled to reinstatement in the union by an order of the state trial court for the limited purpose of the protection of his property rights in union funds; *i.e.*, burial or funeral benefits.

In the instant case, the majority opinion holds that the case involves unfair labor practices under § 8 (b) (1) and § 8 (b) (2) of the Taft-Hartley Act. Without specifically overruling the *Mahoney* case, the majority opinion holds that the trial court had jurisdiction to *award compensatory damages* to plaintiff Selles, ostensibly for a common-law tort. Identical relief was denied in the *Mahoney* case.

I have some doubt as to the validity of the view expressed by the majority—that the instant case involves an unfair labor practice under § 8 (b) (2) of the Federal act. The basis for such doubt is the fact that Mr. Selles was at all times a member of the union, apparently in good standing; and it does not seem to me that

the union requested or coerced any employer to discriminate against Mr. Selles *for the requisite purpose, under § 8(b) (2) of the act, of encouraging or discouraging him with respect to union membership.*

Now, did any other conduct of the union otherwise constitute an unfair labor practice under the Taft-Hartley Act? Allegedly, the union was responsible (a) for breaking up a meeting held by Mr. Selles and other dissident members to discuss critically certain union policies or operations; and allegedly was responsible (b) for Mr. Selles not being dispatched from the hiring hall for employment. In the instant case, Mr. Selles apparently relies upon the latter-mentioned conduct of the union as the basis for his tort claim for damages. In the controversy between Mr. Selles and the union, I think the National Labor Relations Board had jurisdiction, if the conduct of the union under either (a) or (b) above constituted an unfair labor practice.

Considering the present tenuous state of decisional law as to the meaning of the phrase, ". . . concerted activities for . . . mutual aid or protection . . .," (§7 of the act), there is some doubt as to the ultimate legal effect that the Federal courts will give to this language. However, a reasonable reading of the above pertinent language in relation to § 8 (b) (1) of the act resolves any lingering doubt in my mind in favor of the proposition that the alleged conduct of the union—in breaking up the special meeting of Mr. Selles and his associates—constituted an unfair labor practice. In other words, those acts of the union restrained or coerced Mr.

Selles in the exercise of his rights to engage in ". . . concerted activities . . . for the purpose of . . . mutual aid or protection . . ." (§ 7 of the act).

It seems quite significant that, initially, a charge alleging an unfair labor practice was filed with the National Labor Relations Board relative to the difficulties between Mr. Selles and the union; that the board apparently took jurisdiction and commenced an investigation, issued a complaint against the union, and set a date for a hearing on the matter; but that the complaint was then withdrawn by Mr. Selles, and the present lawsuit was instituted.

Given, as indicated above under § 7 of the Taft-Hartley Act, an unfair labor practice by the union in the instant case, the decision of the court in the *Mahoney* case should be (a) clearly and explicitly overruled, or (b) it should be followed. As a majority of the court are unwilling to explicitly overrule the *Mahoney* case, I think the decision therein should be controlling; *i.e.*, that the jurisdiction of the National Labor Relations Board superseded that of the state court, and that the judgment in the instant case should be reversed.

FINLEY, J.

We concur:

ROSELLINI, J.

OTT, J.

2. JUDGMENT OF THE WASHINGTON SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DELL L. SELLES, *Respondent*,

v.

LOCAL 174 AND JOINT COUNCIL NO. 28 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; GEORGE CAVANO AND JIMMY MARTIN, *Appellants*.

Tuesday, September 10, 1957

JUDGMENT

No. 33527

King County No. 465891

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of King County, and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises, it is now, on this 10th day of September A.D. 1957, on motion of Houghton, Cluck, Coughlin and Henry, of counsel for respondent, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby affirmed with costs; and that the said Dell L. Selles have and recover of and from the said Local 174 and Joint Council No. 28 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; George Cavano and Jimmy Martin, and from Continental Casualty Company, surety, the sum of Six thousand five hundred seventy-two and 15/100 ($6,572.15) Dollars, together with his costs and disbursements in the Superior Court, and the costs of this action taxed and allowed at One hundred fifty-seven and no/100 ($157.00) Dollars, and that execution

issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

Of record in Office of the
Clerk of the Supreme Court
Journal 41 at page 658.

APPENDIX B

Statute Involved

Pertinent sections of the Labor Management Relations Act of 1947, as amended, 61 Stat. 136, 29 U.S.C. Secs. 141-187, are as follows:

DEFINITIONS

SECTION 2(7). The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * * * * *

RIGHTS OF EMPLOYEES

SECTION 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

* * * * * * * *

UNFAIR LABOR PRACTICES

SECTION 8(a). It shall be an unfair labor practice for an employer—

* * * * * * * *

(3) by discrimination in regard to hire or tenure

of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ;

* * * * * * * *

SECTION 8(b). It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than hs failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SECTION 10(a). The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means or adjustment or prevention that has been or may be established by agreement, law, or otherwise: . . .

* * * * * * * *

SECTION 10(c). . . . If upon the preponderance of the

testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of the Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: . . .